MAY 8 1997

CLERK

No. 96-1594

In The

Supreme Court of the United States

October Term, 1996

THOMAS D. HAYS, PROFESSIONAL PROPERTY MANAGEMENT OF C.U., INC., an Illinois Corporation, and BNG MANAGEMENT, a Partnership,

Petitioners,

v.

THE CITY OF URBANA, ILLINOIS, a Municipal Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower court's dismissal for lack of jurisdiction under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), due to the Petitioners' failure to produce evidence supporting jurisdiction in response to a factual attack on jurisdiction, is in accord with *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

Pursuant to its Rule 15.2 obligation, the Respondent points out the following inaccuracies and misstatements made in the petition:

The Petitioners completely fail to mention that they have no apartments that are subject to the ordinance. This was affirmatively admitted by one of them in deposition, while the other two admitted in deposition to having said so in the past but later claimed ignorance of the matter.

Despite those admissions, which the Respondent presented in its motions to dismiss for lack of jurisdiction and for summary judgment, the Petitioners ask the court to infer that they have apartments subject to the ordinance. (Pet. at 3.)

The Petitioners claim that the amendment was instigated by a city official who received a "complaint" about one of them. (Pet. at 3.) The official, some time before the passage of the ordinance, received only an anonymous inquiry from a caller who left no information whatsoever. It is unknown whether the inquiry was from an applicant or from a landlord seeking to ascertain the City's position.

From that phone call the Petitioners ask the court to infer that the entire legislative process by which the ordinance was passed was aimed at them. The facts at

summary judgment completely contradicted that odd conspiracy theory. As for the time it took to pass the ordinance, the uncontested evidence showed that what the Petitioners characterize as an "expedited" (Pet. at 3) process was merely a decision not to tie the amendment to a long-running comprehensive review. There is no evidence that the amendment was directed at the Petitioners. The amending process included several City Council meetings, several Human Relations Commission hearings, numerous public notices, and input from a broad spectrum of the public. During this entire process, there was no mention of any alleged violation or complaint against the Petitioners.

The ordinance does not "effectively mandate," (Pet. at 4), participation in the Section 8 program. As the Circuit Court stated, since the Petitioners may not receive Section 8 funds because they have no apartments that qualify, they cannot be held liable under the ordinance. (Op., Pet. App. at 12a.) Similarly, the Petitioners claim incorrectly that the ordinance requires that they "make immediate and significant changes in the conduct of their affairs." (Pet. at 12.) On the contrary, because they have no qualifying apartments, they need make no such changes.

The Respondent City did not "issue," (Pet. at 5), a draft policy on the ordinance amendment. The Petitioners obtained, through discovery, a draft, unfinished statement that was never circulated or implemented, much less issued.

The Petitioners state that the Circuit Court held there was no standing because of what they "failed to allege."

(Pet. at 6, 7, 13.) While the Circuit Court did note that the Petitioners failed to make the proper allegations, (Op., Pet. App. at 11a), the court based its holding on the Petitioners' failure to produce evidence. (Op., Pet. App. at 12a-13a.)

The Petitioners claim to have met the requirements for standing by alleging that they have "some ongoing Section 8 tenancies," (Pet. at 11), is inaccurate and misleading. Those tenancies are in apartments outside the jurisdiction of the City and are therefore not subject to the ordinance. After extensive discovery, the Petitioners repeatedly failed to show that they have any apartments within City's jurisdiction qualified for Section 8 funds. Nor can their claim that they have received inquiries about whether they would accept Section 8 funds mean that they are subject to the ordinance. (Pet. at 11.) The ordinance does not forbid them from telling callers that they do not have any units that qualify for Section 8 benefits. (Ordinance 9596-66, section 12-39, Pet. App. at 16a-17a.)

Lastly, the Petitioners made some suggestion in the courts below that an applicant carrying a Section 8 voucher could use the voucher for any apartment regardless of whether the apartment "qualifies" for Section 8 under the reasonable rent maximums. That suggestion, which was not expressly repeated in their Petition but which was made to the Circuit Court, (Pet. App. at 12a), is incorrect. Under both the voucher and certificate program apartments must fall below a maximum reasonable rent level in order to qualify for Section 8 funds.

REASONS FOR DENYING THE WRIT

The issue presented in the Petition is narrow and unique to the immediate parties. There is no conflict among circuits nor any direct and apparent conflict with the decision of this Court. In addition, the Petitioners did not raise the *Pennell* issue in the Circuit Court.

A. There Is No Conflict with the Decisions of This Court

The Circuit Court's holding was based on this Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Circuit Court applied the rule that, when the party challenging jurisdiction produces facts that negate the existence of jurisdiction, the party asserting jurisdiction bears the burden of producing facts that support the existence of jurisdiction. (Op., Pet. App. at 12a-13a (citing *Lujan*, 504 U.S. at 561-62).

Pennell v. City of San Jose, 485 U.S. 1 (1988), deals with a different issue. In *Pennell*, jurisdiction was tested solely on the basis of the allegations made in the complaint and at oral argument, the truth of which were not contested. *Id.* at 6-8. The defendant in that case raised no factual challenge to the allegations that were required to support jurisdiction. *Id.* at 7-8.

In the present case, by contrast, the Respondent did challenge the existence of facts necessary to support jurisdiction and presented evidence negating jurisdiction. At oral argument, rather than pointing to specific evidence that they had apartments within the boundaries of the City qualifying for Section 8 benefits, the Petitioners

invited the Circuit Court to search through the record for such evidence itself. The Circuit Court held that the Petitioners' failure to produce specific facts supporting jurisdiction – not their failure to make the proper allegations – required dismissal under *Lujan*. (Op., Pet. App. at 12a-13a).]

Nothing in *Pennell* supports the Petitioners' apparent argument that an invitation at oral argument for the court itself to sort through the record suffices as specific evidence to counter their own admissions negating jurisdiction. Even in this Petition for Certiorari, the Petitioners fail to point to such evidence, offering only the same misleading inferences they raised in their briefs to the lower courts.

The issue, as made clear by the Circuit Court, is that the ordinance applies, by its terms, only to those landlords whose properties would actually qualify for Section 8 funds. (Op., Pet. App. at 12a.) The Petitioners' failure to rebut the Respondent's evidence showing that the Petitioners have no apartments within the City that qualify for Section 8 funds required the Circuit Court to apply the rule of *Lujan*. (Op., Pet. App. at 12a-13a.) The holding of *Pennell* regarding uncontested allegations has no bearing on this issue.

B. There Is No Conflict Among the Circuits

The Petitioners do not claim that there is a conflict among the circuits. Rather, they ask the Court to use this case merely to "reconfirm" the holding of *Pennell*. (Pet. at 14.) That opportunity alone does not merit review by the

Court. This is particularly true where the Petitioners failed to raise *Pennell* in the Circuit Court, even in their petition for rehearing.

C. Petitioners Are Precluded from Raising *Pennell* for the First Time in This Court

The Petitioners' argument that *Pennell* should have controlled the decision below is contradicted by their failure to bring that case to the attention of the Court of Appeals at any time, including the petition for rehearing. Because the *Pennell* case was not addressed by the Court of Appeals, this Court would be handicapped in evaluating that court's holding in the context of *Pennell*.

D. This Case Has No Impact Beyond the Parties Involved

This is a fact-specific case that has no impact beyond the parties involved. Ultimately, the Petitioners are left to argue that the Circuit Court "misread" the record. (Pet. at 13.) As adjudication by this Court would have no broad application, review on certiorari is not merited.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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